

**United States Department of Labor
Employees' Compensation Appeals Board**

T.S., Appellant

and

**U.S. POSTAL SERVICE, GREATER
MICHIGAN PERFORMANCE CLUSTER,
Grand Rapids, MI, Employer**

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**Docket No. 13-767
Issued: July 8, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2013 appellant filed a timely appeal from the November 27, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) and the January 17, 2013 nonmerit decision of OWCP. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.²

ISSUES

The issues are: (1) whether OWCP properly determined the date of maximum medical improvement and pay rate in connection with its July 17, 1990 schedule award; and (2) whether OWCP properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. §§ 8101-8193.

² The record also contains a November 27, 2012 merit decision of OWCP, but appellant has not appealed this decision.

FACTUAL HISTORY

OWCP accepted that on June 6, 1978 appellant, then a 37-year-old letter carrier, sustained bilateral meniscus derangement when he was struck by a protruding bolt head. Appellant stopped work after his June 6, 1978 work injury and, on January 5, 1979, he underwent OWCP-authorized left knee surgery, including a total medial meniscectomy. He returned to his regular work on June 23, 1979.

In a July 17, 1990 decision, OWCP granted appellant a schedule award for a 10 percent permanent impairment of his left leg. The award ran for 28.80 weeks from June 23, 1979 to January 10, 1980. Appellant's impairment evaluation at this time appears to have been based on a March 19, 1990 examination by Dr. Richard Moulton, an attending Board-certified orthopedic surgeon.

In a September 27, 2011 report, Dr. John W. Ellis, an attending Board-certified family practitioner, reported the findings of his examination of appellant. He determined that appellant had a 26 percent permanent impairment of his left leg under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009). Dr. Ellis based his impairment rating on appellant's total medial meniscectomy and his lateral collateral ligament and medial collateral ligament laxity.

In a December 10, 2011 report, Dr. Brian M. Tonne, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, determined that appellant had a 28 percent permanent impairment of his left leg under the standards of the sixth edition of the A.M.A., *Guides*. He reviewed the medical evidence of record, including the September 27, 2011 report of Dr. Ellis and based his impairment rating on appellant's primary left knee joint arthritis.

In a January 9, 2012 decision, OWCP granted appellant a schedule award for an additional 18 percent permanent impairment of his left leg, such that he received schedule award compensation for his total left leg impairment of 28 percent. The award ran for 51.84 weeks from September 27, 2011 to September 23, 2012 and listed the date of maximum medical improvement as September 27, 2011.

In April 2012, OWCP upgraded appellant's accepted conditions due to the June 6, 1978 injury to include bilateral traumatic arthropathy of his lower legs and other derangement of his right knee.

In a March 3, 2012 letter, appellant requested reconsideration noting his disagreement with OWCP's July 17, 1990 schedule award decision. He argued that OWCP improperly used a retroactive date of maximum medical improvement, June 23, 1979, that was more than 10 years prior to Dr. Moulton's March 1990 evaluation. Appellant asserted that OWCP denied him a proper pay rate due to the computation of his July 17, 1990 schedule award with an improper date of maximum medical improvement. He noted that it was well established that the period covered by the schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury.

In a May 21, 2012 decision, OWCP determined that appellant was not entitled to additional schedule award compensation for his left leg, noting that the medical evidence of record

showed that he had a 28 percent permanent impairment of his left leg for which he received schedule awards.

In a May 26, 2012 reconsideration request, appellant indicated that he was not challenging the percent of left leg impairment granted in OWCP's July 17, 1990 and January 9, 2012 schedule award decisions. Rather, he was challenging OWCP's use of a retroactive date of maximum medical improvement in the July 17, 1990 decision and the adverse effect it had on the amount of compensation he received.

In a November 27, 2012 decision, OWCP affirmed its May 21, 2012 decision, noting that the medical evidence did not show that appellant was entitled to additional schedule award compensation for his left leg. It stated, "As far as the effective pay rate type, which is noted as the date disability began: October 23, 1978. A review of the file indicates that you were appropriately compensated."

In a December 22, 2012 letter, appellant requested reconsideration of OWCP's November 27, 2012 decision. He again asserted that OWCP arbitrarily set a date of maximum medical improvement which was 11 years prior to the date his physician performed the impairment measurements for the July 17, 1990 schedule award. Appellant argued that OWCP set an 11-year retroactive date maximum medical improvement without providing any medical evidence for setting a retroactive date. He asserted that OWCP did not adequately address the maximum medical improvement and pay rate matters in its prior decisions.

In a January 17, 2013 decision, OWCP denied appellant's request for merit review of his claim. Regarding the basis for the denial of merit review, it stated:

"Formal decisions including schedule awards include appeal rights which allow the claimant to request an appeal should he or she disagree with a particular decision. Three different appeal options are available to the claimant and each appeal option has a specific deadline. Requests for reconsideration must be signed, dated and received within one year of the date of the decision. While the December 22, 2012 reconsideration request is within one year of the November 27, 2012 decision, your argument applies to a decision that was issued [12] years ago.

"The evidence you submitted in support of your claim for reconsideration is not sufficient to warrant review of your claim as the evidence you submitted only argues the merits of a decision issued in 1990. Your statements relate only to a decision issued in 1990 and the appeal rights for that decision have long since expired. Since the appeal rights for the 1990 decision are expired, no further discussion of the merits of that decision are warranted at this time now or in the future."

LEGAL PRECEDENT -- ISSUE 1

It is well settled that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of his or her employment injury and that maximum improvement means that the physical condition of the injured member has

stabilized and will not improve further.³ The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the work injury.⁴ The Board further notes that the determination of the date of maximum medical improvement and the commencement date of a given schedule award may have an effect on the particular pay rate applied.

In determining whether a claimant has discharged his burden of proof and is entitled to compensation benefits, OWCP is required by statute and regulation to make findings of fact.⁵ OWCP's procedures further specifies that a final decision of OWCP must include findings of fact and provide clear reasoning which allows the claimant to "understand the precise defect of the claim and the kind of evidence which would tend to overcome it."⁶ These requirements are supported by Board precedent.⁷

ANALYSIS -- ISSUE 1

In a July 17, 1990 decision, OWCP granted appellant a schedule award for a 10 percent permanent impairment of his left leg. In a January 9, 2012 decision, it granted him a schedule award for an additional 18 percent permanent impairment of his left leg, such that he received schedule award compensation for his total left leg impairment of 28 percent.

In a November 27, 2012 decision, OWCP determined that appellant had no more than a 28 percent left leg impairment and found that it had used a proper pay rate in connection with its July 17, 1990 decision. In a January 17, 2013 decision, it denied his request for merit review.

Appellant has explicitly indicated that he is not challenging the percent of left leg impairment granted by OWCP in its July 17, 1990 and January 9, 2012 decisions. Rather, he argued that OWCP improperly used a retroactive date of maximum medical improvement, June 23, 1979, in connection with its July 17, 1990 schedule award and thereby denied him a proper pay rate for that award.

The Board finds that OWCP did not provide adequate facts and findings in its November 27, 2012 decision with respect to appellant's claim that an improper date of maximum medical improvement and pay rate was used in connection with the July 17, 1990 schedule award.⁸ In its November 27, 2012 decision, OWCP merely stated, "As far as the effective pay rate type, which is noted as the date disability began: October 23, 1978. A review of the file indicates that you were appropriately compensated." It did not provide any discussion of the relevant

³ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Neil Papkin*, 39 ECAB 239, 243 (1987).

⁴ *J.C.*, 58 ECAB 258 (2007).

⁵ 5 U.S.C. § 8124(a) provides that OWCP "shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP "shall contain findings of fact and a statement of reasons."

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (March 1997).

⁷ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

⁸ 20 C.F.R. § 10.126.

precedent for determining the date of maximum medical improvement and the pay rate for schedule awards. Given OWCP's brief conclusory statement on this matter, appellant would not understand the defects of his claim and the type of evidence needed to overcome them.

Therefore, the case shall be remanded to OWCP for proper evaluation of appellant's claim regarding the date of maximum medical improvement and pay rate for his July 17, 1990 schedule award.⁹ After such development it deems necessary, OWCP shall issue an appropriate decision regarding his schedule award claim.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP properly determined the date of maximum medical improvement and pay rate in connection with its July 17, 1990 schedule award.

ORDER

IT IS HEREBY ORDERED THAT the November 27, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: July 8, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁹ Given the Board's disposition of the merit issue of this claim, it is not necessary to consider the nonmerit issue.